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Richard M. Riccobono
President and Chief Executive Officer

April 26, 2010

By e-mail to RegComments@FHFA.gov

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General Counsel
Federal Housing Finance Agency
Fourth Floor
1700 G Street, NW
Washington, DC 20552

Re: Comments on Proposed Rulemaking Regarding Minority and Women Inclusion; RIN 2590-AA28

Dear Mr. Pollard:

The Federal Home Loan Bank of Seattle ("FHLBank") appreciates this opportunity to comment on the Federal Housing Finance Agency ("FHFA") proposed rule on minority and women inclusion. The FHFA's proposed regulations seek to implement Section 1116 of the Housing and Economic Recovery Act of 2008 ("HERA"). The FHFA has invited comments on all aspects of the proposed regulations; therefore, the FHLBank respectfully submits the following comments for your consideration.

I. General Comments

Refining the Legal Standard in HERA "To the Maximum Extent Possible"

Proposed Sections 1207.2(b) and 1207.21(b) require the regulated entities to maintain standards and procedures to ensure, "to the maximum extent possible," the inclusion and utilization of diverse individuals and companies. The language "to the maximum extent possible" derives from HERA and is found in US Code 12 U.S.C. §4520(b).

In our view, the regulation would be much improved if the FHFA were to clarify the meaning of "to the maximum extent possible," to resolve certain ambiguities in a regulated entity's compliance obligations. We strongly believe that 12 U.S.C. §4520(b) does not grant to the FHLBank a license to pursue inclusion efforts in any way that is inconsistent with either (i) our obligations to comply with other federal laws and regulations,1 (ii) our obligations to maintain the FHLBank's safety and soundness, or (iii) our obligations to fulfill the FHLBank's statutory missions to promote affordable housing and community development and to

[1] For example, to the extent Title VII of the Civil Rights Act of 1964, the Americans with Disabilities Act, 42 U.S.C. 1981, and other federal antidiscrimination laws prohibit an FHLBank from engaging in certain practices, all of these prohibitions would remain in effect and undisturbed by 12 U.S.C. 4520 and the proposed regulation.

provide liquidity to members.2 Please provide a definition of "to the maximum extent possible" that makes clear that the FHLBank may seek inclusiveness only in ways that are consistent with these fundamental and non-negotiable duties.

The FHFA may want to review similar diversity regulations issued by other Federal Banking Regulators in order to provide guidance relating to the proper weighing of competing issues of outreach efforts, the FHLBank's obligations listed above, and common business issues such as cost and reliability. For example, the Office of the Comptroller of the Currency states that "The OCC awards contracts consistent with the principles of full and open competition and best value acquisition and with the concept of contracting for agency needs at the lowest practical cost." See 12 C.F.R. Part 4.63.

Impermissibility of Formal or Informal Quotas

It is noteworthy that neither 12 U.S.C. §4520 nor the proposed regulation permits or requires a regulated entity to create minimum quotas or apply other numbers-based models in promoting diversity in their employment and contracting processes. This is appropriate since these kinds of approaches could be unlawful under applicable US Supreme Court decisions and Title VII of the Civil Rights Act of 1964, which requires equal employment opportunities for all genders and racial groups. We also note that regulations of the Department of Labor's Office of Federal Contract Compliance Programs provide that "[q]uotas are expressly forbidden."3

A quota system becomes no more permissible if it is informal and enforced only through the FHFA examination process. In reviewing the regulated entities' compliance with Part 1207, FHFA examiners should focus on the robustness of the entity's inclusion processes, not the end results of those processes. Note that a de facto quota can be created simply through having and communicating to the regulated entities a regulatory expectation that the number of diverse employees hired and promoted and the number of diverse contractors engaged must increase from year to year (or through just inferring from the reported numbers that the regulated entity's inclusion processes are deficient). Please clarify in the final regulation that the FHFA will not expect the regulated entities to use quotas and numbers-based models in their inclusion efforts and will not permit agency personnel to promote the use of such an approach through the examination process.

Scope of Contracts Subject to Inclusion

Proposed Sections 1207.2(b) and 1207.22(a) provide that they apply to "all contracts for services," while proposed Section 1207.23(b)(10) references soliciting contractors "to provide service" to the regulated entity. (emphasis added) These provisions are consistent with 12 U.S.C. §4520(c), which provides that "this section shall apply to all contracts of a regulated entity for services of any kind...." (emphasis added)

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[2] See, e.g., 12 U.S.C. 4513(f)(1)(B) and (C).

[3] 41 C.F.R. § 60-2.16(e)(1).

However, other sections of the proposed regulation purport to apply to all contracts of a regulated entity, and not just contracts for services.4 This interpretation is inappropriate and unworkable.

The regulated entities, like most companies, are party to a wide range of contracts that are not contracting opportunities under any traditional understanding. The beginning of a partial list of such contracts for the FHLBank would include: standby letters of credit; lien release and intercreditor agreements with competing secured creditors to ensure the priority of a security interest in collateral; customer contracts (including advances agreements and other contracts with members and contracts with recipients and beneficiaries of AHP grants and loans); contracts with principals in financial transactions (including contracts with swap counterparties and agreements with issuers and trustees evidencing MBS and other investments by a regulated entity);5 contracts evidencing debt or equity issued by a regulated entity to its investors; indemnification agreements in favor of employees, officers, and directors; and information sharing agreements between the FHLBank and state or federal banking regulators. Imposing procurement outreach obligations on contracts having nothing to do with procurement will make compliance impossible and detract from the effectiveness of our inclusion efforts on actual contracting opportunities.6 Therefore, we request that you first clarify the discrepancies as to which contracts are within the purview of the proposed regulation, including clarifying the sections that discuss "contracts for services," soliciting contractors "to provide service," contracts "for services of any kind," and "all types of contracts." In addition, we request that the FHFA specifically exclude certain types of contracts (including contracts with members and other examples cited in the foregoing paragraph) from the provisions of this regulation. We believe the FHFA may do so because 12 U.S.C. §4520(b) requires inclusion "to the maximum extent possible." It would be impossible for the FHLBank to comply with particular provisions of the regulation for certain types of contracts.7 Additionally, reporting on all types of contracts, whether or not it is possible to control outreach efforts or the inclusion of minorities, women, or individuals with disabilities in those particular contracts, may significantly distort the results of the FHLBank's outreach efforts since the FHLBank could not conduct outreach efforts for a significant portion of its contracts.

In addition, we note how critical it will be that each regulated entity ensures that its accounting systems for tracking spending match up with the FHFA's ultimate definition of which contracts are subject to Sections 1207.23(b)(11) through (13) reporting requirements. Specifically, with respect to companies providing goods and services paid for by FHLBank

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[4] See proposed Sections 1207.1 (definition of "business and activities" includes "all types of contracts"), 1207.21(b) (inclusion efforts to cover "all types of contracts"), 1207.21(b)(6) (nondiscrimination clause to be inserted in "each contract [a regulated entity] enters"), 1207.21(c)(1) (contracting outreach efforts "(a)pply to all contracts entered by the regulated entity"), and 1207.23(b)(11) (obligation to report "the number of contracts" entered with diverse businesses and individuals).

[5] Of course, to the extent that a regulated entity pays an institution to broker a financial transaction, contracts for such brokerage services (e.g., insurance brokerage and brokered overnight Fed Funds transactions) are properly considered within the scope of Part 1207.

[6] For example, how would a regulated entity comply with the requirement to consider diversity as a component when it sells debt or equity to investors? When it purchases investments for its own portfolio? When it operates its core business of providing funding to its customers? Moreover, given the dollar amounts involved, these activities -- if subject to the contractor reporting rules -- would overwhelm and distort the reporting related to actual diverse vendor purchases by a regulated entity.

[7] For example, it would be impossible for an FHLBank to comply with §1207.21(c) if that section applies to contracts with members, indemnification agreements with employees, and AHP grants.

employees or directors who are then reimbursed by the FHLBank, we do not maintain the same level of detailed information regarding these companies as we would for vendors receiving payment directly from the FHLBank.8 We expect this is true of the accounting systems for other regulated entities, as well. Therefore, we request that, for purposes of reporting to the FHFA on contracting inclusion efforts, a regulated entity be permitted to exclude payments not made directly by a regulated entity to a vendor (e.g., employee or director reimbursement payments).

Reliance on Voluntary Self-Identification by Employees, Directors, and Individual Contractors

For individuals who are employees, directors or contractors, a regulated entity will need to rely (for both practical and legal reasons) on voluntary self-identification to determine whether such individuals are minorities, women, or persons with disabilities. Based on our experience, many such individuals will refuse to self-identify. It is also possible that some such individuals may self-identify inaccurately. These two factors necessarily limit the accuracy of certain data and information required to be presented in the Section 1207.23 annual report.

Please clarify with respect to Section 1207.23(a), officer certification, that the accuracy of the data in the annual report may be made subject to the above caveats and other reasonable limitations on the accuracy of a regulated entity's diversity reporting, to the extent such limitations are clearly identified in the annual report.

In addition, the FHLBank is concerned that the proposed regulation may conflict with the Americans with Disabilities Act ("ADA"), which bars companies from asking applicants for employment about disabled status unless doing so is necessary under federal law to identify applicants or clients with disabilities in order to provide them with required special services, as opposed to data collection and reporting purposes. The ADA may also limit a company from making a similar inquiry of individuals who are being considered as potential contractors. To the extent this is true, a regulated entity will not, as a practical matter, be able to consider the disabled status of such individuals as a component when the regulated entity reviews and evaluates offers from individual contractors. Please clarify that a regulated entity's duty to comply with such a prohibition under the ADA would partially supersede its obligations under proposed Section 1207.21(c)(3).

II. Comments on Specific Sections of the Proposed Rule

1207.1 Definitions

Business and Activities
The definition of business and activities is very broad and makes compliance with various sections of the regulations virtually impossible.

HERA anticipates broad coverage, but not as broad as the definition set forth in the proposed regulations. HERA refers to "all business and activities of the regulated entity at all levels, including in procurement, insurance, and all types of contracts (including contracts

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[8] For example, the Bank would not necessarily have a legal name or address for a taxi cab company providing services to a Bank employee traveling on business, much less any information about the possible diverse status of the owners of the taxi cab company.

for the issuance or guarantee of any debt, equity, or mortgage-related securities, the management of its mortgage and securities portfolios, the making of its equity investments, the purchase, sale and servicing of single- and multi-family mortgage loans, and the implementation of its affordable housing program and initiatives.)" 12 U.S.C. §4520(b).

By contrast, the definition in §1207.1 includes "operational, commercial, and economic endeavors of any kind, whether for profit or not for profit and whether regularly or irregularly engaged in by a regulated entity." While the list of examples in the section is consistent with the regulations, the "operational, commercial, and economic endeavors..." language encompasses anything a regulated entity does. This seems to exceed the scope of the rules requiring inclusion in employment and contracting.

Disability
Also, the definition of disability is problematic for several reasons.

First, HERA specifically limits its inclusion and diversity requirements to women and minorities, and specifically defines those terms. 46 U.S.C. § 4520(b). It does not cover individuals with disabilities or disability-owned businesses. Thus, the regulations exceed FHFA's authority to the extent they include individuals with disabilities or disabled-owned businesses. Protections for individuals with disabilities are provided under other federal laws including the ADA. While the FHLBank applauds the efforts and well-meaning intentions of the FHFA to help other potentially disadvantaged groups, it is the role of Congress to create law and public policy on this point. Therefore, the FHLBank requests that the FHFA remove references in the final regulation to disabilities.

Should the FHFA retain references to disability in the final regulation, the definition of disability is problematic because it defines disability to have the same meaning as that provided by 29 C.F.R. 1630.2(g) and 1630.3, regulations interpreting the ADA.[9] That definition includes individuals "regarded as" having an impairment that substantially limits a major life activity. It is not clear, in the context of the proposed regulations, how someone would be "regarded as," and this has been a subject of great confusion in the case law. Indeed, under the pre-2009 version of the ADA, several courts of appeals held that an employer had an obligation to accommodate individuals regarded as having disabilities. The revision to the ADA has eliminated that issue, but we expect continuing litigation over a company's obligations with respect to those "regarded as" having a disability.

Disabled-owned business
The definition of disabled-owned business is problematic, in part, because it includes businesses more than 50 percent owned or controlled by a person with a disability, and businesses for which more than 50 percent of the net profit or loss accrues to one or more persons with a disability.

One practical issue is that this information is not readily available to the public.

As discussed above, identifying those businesses would require individuals to self-identify as having disabilities. As a result, businesses with individuals willing to self-identify will

[9] Under 29 C.F.R. Part 1630.2(g), "Disability" means, with respect to an individual, (a) a physical or mental impairment that substantially limits one or more of the major life activities of such individual; (2) a record of such impairment; (3) or being regarded as having such an impairment. Note that the regulations under the ADA are in the process of revision and have not yet been finalized.

receive the benefits of the regulations while individuals not willing to self-identify would not. This approach does not seem reasonably calculated to include all disabled individuals or disabled-owned businesses in contracting opportunities.

Moreover, because the definition of disability includes individuals regarded as having a qualifying impairment, the definition of disabled-owned business includes businesses where individuals "regarded as" having a disability own or control more than 50 percent of the business or are responsible for more than 50 percent of the net profit or loss. The "regarded as" prong of the ADA definition of disability does not make sense in this context.

Minority
The definition of minority is inconsistent with the statutory language, which incorporates the definition of minorities in Section 1204(c) of the Financial Institutions Reform, Recovery and Enforcement Act of 1989. That section defines the term minority as "any Black American, Native American, Hispanic American, or Asian American." By contrast, the regulations define minority as Black or African American, American Indian or Alaska Native, Hispanic or Latino American, and Native Hawaiian or Other Pacific Islander.

1207.20 Structure of a Regulated Entity's Designated Office of Minority and Women Inclusion

Proposed Section 1207.20 requires each regulated entity10 to establish and maintain an office of minority and women inclusion (or designate and maintain an existing office) to perform the responsibilities under the proposed regulation, under the direction of an officer of the regulated entity who reports directly to either the Chief Executive Officer or the Chief Operating Officer or the equivalent.

Please clarify that regulated entity employees responsible for a portion of the regulated entity's compliance processes need not formally report to the officer directing the entity's inclusion efforts and that the officer's role under Section 1207.20(a) is to coordinate the regulated entity's inclusion efforts. For example, a regulated entity may designate its head of human resources as its Section 1207.20(a) responsible officer, but then rely on a separate accounting department to track diverse contractor spend amounts or on a separate procurement department to meet certain of the contracting requirements. In other words, please clarify that some of the Part 1207 responsibilities may be performed by employees not within the regulated entity's office of minority and women inclusion.

1207.20(b) Adequate Resources

The FHLBank believes that it is unnecessary for the FHFA to adopt language in the regulation that would require the FHLBank to provide sufficient resources to fulfill the duties prescribed by the regulation. The text of HERA does not require this language, and current FHFA regulations do not contain similar provisions. Unless the FHFA adopts similar language throughout all its regulations, an allocation requirement to ensure regulatory compliance adds no additional regulatory requirements while creating an open question as to why the FHFA has not required sufficient resource allocation by the FHLBank to ensure compliance with other regulations.

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[10] For convenience, each reference to "regulated entity" in this comment letter should be read to include the Office of Finance unless the context clearly indicates otherwise.

1207.21(a) Equal Opportunity Notice - Notices Provided in Alternative Media

Requirements in 1207.21(a) and (b) that relate to the publication of the policies and procedures that require media (Braille & audio) would be burdensome requirements to comply with. These requirements assume that the FHLBank would update its EEO notice, policies and procedures, and job postings on an ongoing basis to be both Braille and audio accessible, regardless of whether the FHLBank has employees or applicants who are vision or hearing impaired. The FHLBank is cognizant of the ADA and, where employees or applicants request accommodations, the FHLBank will comply with all its legal obligations.

1207.21(a) Equal Opportunity Notice – Classifications

The prescribed equal opportunity notice set forth in §1207.21(a) exceeds the scope of FHFA's regulatory authority. It includes "race, color, national origin, sex, religion, age, disability status, or genetic information." HERA limits inclusion and diversity requirements to women and racial minorities.

1207.21(b)(3) Internal Procedures to Resolve Complaints of Discrimination in Employment and Contracting Which Shall Include Mandatory Alternative Dispute Resolution Techniques

The FHLBank asks that the FHFA remove this section from the final regulation. The provisions of this section relating to resolving disputes in contracting run afoul of the contracting rights of the FHLBank as set forth by the Federal Home Loan Bank Act ("FHLB Act") at 12 U.S.C. 1432, the contracting rights of the vendor, and 1207.3 of this proposed regulation.

Federal Banking regulators have been cautious about the use of ADR processes with regards to certain contracts, e.g., external audit engagement letters. The Interagency Advisory on the Unsafe and Unsound Use of Limitation of Liability Provisions in External Audit Engagement Letters ("the Advisory") were concerned that mandatory ADR provisions could limit the liability of the auditor. The Advisory noted that "By agreeing in advance to submit disputes to mandatory ADR, financial institutions may waive the right to full discovery, limit appellate review, or limit or waive other rights and protections available in ordinary litigation proceedings." Although the Advisory did not find ADR provisions to be unsafe and unsound on their face, they stated that federal banking agencies should provide guidance to their institutions to "carefully review mandatory ADR and jury trial provisions in engagement letters, as well as any agreements regarding rules of procedure, and to fully comprehend the ramifications of any agreement to waive any available remedies."

The provisions of 12 C.F.R. §1207.21(3) relating to complaints of discrimination in employment should also be removed from the final regulation. This section stands in opposition to recent legislative initiatives to preclude mandatory arbitration of employment-related claims. For example, the American Recovery and Reinvestment Act of 2009 ("ARRA") precludes predispute arbitration agreements for claims under the ARRA employee whistleblower provision, except for certain disputes arising under a collective bargaining agreement. See American Recovery and Reinvestment Act of 2009, Pub. L. No. 111-5, Section 1553(d)(1)-(3). Similarly, the final version of the FY 2010 Defense Appropriations Bill, which President Obama is expected to sign into law, prohibits federal contractors on certain defense projects from requiring employees and independent contractors to agree to arbitrate certain employment discrimination and harassment claims as a condition of employment. See H.R. 3326, 111th Cong. (2009). In short, the proposed section stands

against the current movement away from mandatory arbitration procedures and would oppose recent legislative efforts to preserve all means available to resolve complaints of discrimination.

Finally, the FHLBank notes that the proposed regulation does not require the agency to utilize ADR in the contracting context.

1207.21(b)(4) Requests for Reasonable Accommodations

The reasonable accommodation provision in § 1207.21(b)(4) falls outside the scope of HERA. Moreover, this provision, as applied, would create substantive rights not otherwise available under applicable law, which is inconsistent with §1207.3.11 For example, the language anticipates accommodation of all individuals with disabilities for all purposes, not, for example, reasonable accommodation for qualified individuals with disabilities that does not impose an undue hardship per the ADA. Regulated entities are not required to accommodate all disabilities under current, applicable law.

The FHLBank asks that the FHFA clarify the term "effective procedures."

1207.21(b)(6) Material Clauses in Contracts

Section 1207.21(b)(6) of the proposed rule would require a regulated entity to include in each contract it enters into with a contractor "a material clause committing a contractor to practice principles of equal opportunity and non-discrimination in all its business activities ...." The FHLBank does not have contracting power equivalent to that of the federal government. The FHLBank will have no leverage with many critical vendors due to its size. Examples of such vendors include computer hardware and software vendors such as Microsoft, Dell, and Sun Microsystems; financial counterparties, including the largest banks and brokerage houses; as well as insurance companies, to name a few.

The FHLBank requests that this section be removed as over burdensome and ultimately unenforceable. The FHLBank enters into contracts with operationally critical vendors without the ability to edit or amend the contract. Therefore, the FHLBank is unable to comply with this section. Further, the FHLBank does not have the ability to monitor or enforce subcontractors to enter into the above clause. Due to the above-mentioned reasons, we request the entirety of Section 1207.21(b)(6) be removed.

1207.21(c) Outreach for Contracting

The FHLBank requests "all contracts" as referenced in 1207.21(c)(1) be clarified to mean contracts for goods and services as written in 12 C.F.R. §361.6 and implemented by the Federal Deposit Insurance Company ("FDIC"). Applying these standards to membership agreements and other non-goods and services contracts does not appear consistent with the intention of this proposed rule.

1207.21(c)(2) and 1207.23(b)(10) Outreach for Contracting/Annual Reports

The FHLBank respectfully requests that the FHFA clarify the requirement in proposed §1207.21(c)(2) requiring publication of contracting opportunities designed to encourage

[11] Section 1207.3 provides that the regulations are not intended to create any right or benefit, substantive or procedural, enforceable at law, in equity, or through administrative proceeding ....

contractors that are minorities, women, individuals with disabilities, and minority-, women-, and disabled-owned businesses to submit offers or bid for the award of such contracts. The FHLBank believes that it is extremely useful to include these individuals and businesses wherever applicable in the RFP process for specific bids where the FHLBank's policies require that an RFP be issued. However, the FHLBank's ability to publish RFPs to such businesses depends upon multiple factors, including, but not limited to, the presence of contractors that are minorities, women, individuals with disabilities, and minority-, women-, and disabled-owned businesses that provide such goods and services in a specific geographic area, and successful identification of such businesses. The term publication can be misleading as each geographic area does not necessarily offer trade publications that target minorities, women, individuals with disabilities, and minority-, women-, and disabled-owned businesses in every possible field of business.

The FHLBank also requests that the FHFA clarify similar verbiage in proposed §1207.23(b)(10), which requires a description of activities to solicit or advertise for contractors to provide service to the regulated entity. In this case, the term "advertise" can be misleading for the same reasons as the term "publication" referenced above.

1207.22(1)(a) Reports

Under the Proposed Rule, the FHFA requires each regulated entity, within 90 days after the effective date, to submit a preliminary status report describing the actions taken thus far in establishing its office of minority and women inclusion and the plans for and progress toward implementation. The final regulation should enumerate the expected deliverables to be provided in the preliminary status report. Since this is a preliminary report, compliance deadlines should be enumerated outside of this status reporting process. Specific guidance to assist a regulated entity in meeting its compliance objectives should be communicated to all regulated entities so everyone understands the compliance expectations. In addition, the FHFA should provide templates for the regulated entities to complete contemporaneously with the publication of the final rule to ensure each regulated entity is providing the exact information required.

1207.22(c) Annual Reporting Cycle

Proposed Section 1207.22(c) establishes a calendar year reporting period and requires each regulated entity to submit its annual report by February 1 of each year (i.e. one month after the end of the reporting period).

The FHLBank requests that the FHFA revise this section to provide for a minimum of 120 days between the end of the reporting period and the due date for the annual report. Certain Federal Home Loan Banks have already engaged a minority-owned firm to review their vendor databases and confirm which vendors are certified diverse contractors, and this FHLBank is considering a similar engagement. However, our understanding is that such reviews can often take up to nine or ten weeks to complete, since they also involve outreach to specific vendors to confirm their diversity status. Since a regulated entity will not know the entire universe of its vendors for a certain calendar year until after December 31 of that year, the process of confirming which of its vendors are certified diverse can theoretically last until mid-March. Then, each regulated entity will need time to analyze the diverse contractor spend numbers received, identify successes and trends in its contracting inclusion efforts, determine a plan for improving its contracting inclusion efforts for the following reporting year, draft the annual report, circulate the draft report for internal review

and approval (which may include review by outside discrimination law counsel), before submitting the report to the FHFA. This process simply cannot be completed in any thorough and robust manner within one month following the end of the reporting period.

If the FHFA is concerned from a timing perspective that a May 1 annual reporting deadline does not permit the agency to incorporate aspects of the regulated entities' annual diversity reports in the agency's annual report to Congress, then we ask that the proposed regulation be modified to accommodate both this issue and the goal of providing the regulated entities sufficient time to prepare accurate reports. We suggest in that case that the FHFA adopt an October 1 to September 30 reporting period under Section 1207.22(c) and then retain the existing February 1 due date for annual report submission.12

1207.22(a)(1) Timing for the Initial Reports

The proposed regulation would require both a preliminary status report within 90 days after a final regulation becomes effective and the initial annual report to be submitted by February 1, 2011.

Most of the FHLBank's efforts to comply with the diversity regulation will of necessity begin only after a final regulation is issued, since it is impossible to know in advance what changes the FHFA may effect in the final regulation in response to comments received. Given this fact, it would be unfair and counterproductive to ask the FHLBank to report on its compliance efforts for periods preceding the effective date of the final regulation (i.e. before the 12 U.S.C. §4520(a) "standards and requirements" are established by the Director).

We believe the best approach would be (i) retaining the requirement to provide a preliminary status report within 90 days after final regulation effective date while (ii) modifying the initial annual reporting obligation such that the first annual report would cover the first full 12-month reporting period occurring after the effective date of the final regulation.

For example, under this approach, if the final regulation becomes effective on September 1, 2010, the agency adopts an October 1 to September 30 reporting period as requested above, and the annual report remains due on February 1 for the preceding reporting period, then, (a) the preliminary status report would be due December 1, 2010 and (b) the initial annual report would be due February 1, 2012 covering the October 1, 2010 to September 30, 2011 reporting period.

1207.21(c)(2) Contracting Opportunity Publication Requirements

Please confirm that, in establishing standards and procedures for publication of contracting opportunities under proposed Section 1207.21(c)(2), each regulated entity retains the discretion to create reasonable exceptions from a general rule of publication. For example, a regulated entity could carve out and not require publication of contracts below a certain dollar threshold, contracts for time sensitive engagements, and contracts for confidential engagements (e.g., for a law firm to conduct a sensitive investigation at a regulated entity).

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[12] We note in this regard that 12 U.S.C. 4520(d) does not mandate a calendar year reporting period, as it only requires a regulated entity to report on its inclusion activities in the period since its last report.

We also question what is meant by a Federal Home Loan Bank's "annual report to the Director" under proposed Section 1207.22(d). If the Director is not currently requiring receipt of such an annual report, then we would suggest deleting this reference in the final regulation, and simply requiring the diversity annual report in the format set forth in Section 1207.23.

1207.22(d) Annual Summary

The FHLBank requests clarification as to the difference between "third-party contractors" and "contractors that are minorities...." We ask that either the FHFA clarify what is meant by "third-party contractor" either in the final regulation or to provide guidance in the preamble.

1207.23(b)(3) Reports Showing Disability Classifications

Section 1207.23(b)(3) would require, among other things, that a regulated entity annually report to the FHFA the number of persons with disabilities applying for employment with the regulated entity. However, the Equal Employment Opportunity Commission (EEOC) advises employers against making disability-related inquiries prior to making an offer of employment, and therefore, the regulated entity will not be able to provide data showing the disability classification of individuals who apply for but are not offered employment as requested by this section. In fact, asking for this data would violate the ADA. *See e.g.*, EEOC Notice No. 915.002, *Enforcement Guidance: Preemployment Disability-Related Questions and Medical Examinations* (October 10, 1995), available at www.eeoc.gov/policy/docs/preemp.html; *Questions and Answers: Enforcement Guidance on Disability-Related Inquiries and Medical Examinations of Employees Under the Americans With Disabilities Act (ADA)*, available at www.eeoc.gov/policy/docs/qanda-inquiries.html; *EEOC Enforcement Guidance: Disability-Related Inquiries and Medical Examinations of Employees Under the Americans With Disabilities Act ("ADA")*, available at www.eeoc.gov/policy/docs/guidance-inquiries.html.

As such, Section 1207.23(b)(3) should be modified to remove this requirement.

Sections 1207.23(b)(3), (7), and (8) Collection of Data Related to Job Applicants and Employee Promotions

The data required by Sections 1207.23(b)(3), (7) and (8) appears to encompass all job applicants and employees regardless of whether the individual is qualified for the specific job position sought. Specifically, these sections seek data regarding the number of individuals who apply for employment with the regulated entity by minority, gender, and disability classification, as compared to the number of individuals hired for employment by minority, gender, and disability classification, without regard to whether the individual meets the minimum qualifications required for the position at issue. The same problem exists with regard to promotions.

By comparison, the EEOC and the Department of Labor's Office of Federal Contract Compliance Programs have focused on comparative analysis by utilizing a concept where the employer can apply minimum job qualifications to eliminate unqualified persons, thus making the comparison between qualified applicants and those chosen for the position more reflective of real-life determinations. Otherwise, an "apples versus oranges" problem arises and comparisons between those who apply and those who are chosen mean very little.

Therefore, we request that the final regulation clarify that a regulated entity may apply minimum job qualifications to eliminate unqualified persons, for purposes of reporting the number of individuals applying for employment or promotion under Sections 1207.23(b)(3), (7) and (8).

Another issue exists in that each Federal Home Loan Bank defines "applicants" differently, which, therefore, affects the FHFA's report when such information is combined. For example, many Federal Home Loan Banks consider applicants to be individuals who have applied for a position and completed an office interview. Other Federal Home Loan Banks consider as applicants all individuals who have applied for a position and are qualified, regardless of whether the individuals are interviewed.

1207.23(b)(5) Collections of Data Regarding Terminations

Because many Federal Home Loan Banks have a small number of employees with few separations, the FHLBank is concerned that the proposed rule's requirement for regulated entities to report employee separations by disability classification may make the identity of a separated employee and his or her disability easily ascertainable. In such circumstances, the sharing of this information would conflict with the goals under the ADA and Health Insurance Portability and Accountability Act ("HIPAA") to keep such information confidential and §1207.22 of the proposed rule, which provides that the "FHFA is not requiring, and does not desire, that reports under this part contain personally identifiable information."

1207.23(b)(10) Annual Reports – Outreach Activities

The FHLBank respectfully requests that the FHFA remove the provisions in proposed §1207.23(b)(10) requiring reporting on outreach activities to low-income and inner-city populations. The provisions of 12 U.S.C. §4520 that apply to the regulated entities focus on the inclusion and utilization of minorities and women, but do not require outreach to low-income or inner-city populations. Although the FHLBank might find such outreach useful at times as part of its program to include and utilize minorities and women, such program would not necessarily need to include outreach to low-income and inner-city populations and, alternatively, outreach to low-income and inner-city populations would not necessarily achieve the purposes of 12 U.S.C. §4520 as it applies to the regulated entities. The FHFA appropriately included expanded workforce diversity requirements for the FHFA as mandated by 12 U.S.C. §4520(f), which requires the FHFA to sponsor and recruit at job fairs in urban communities. The FHFA did not impose such requirements on the Federal Home Loan Banks because Congress specifically limited such requirements to the FHFA. Similarly, the FHFA should exclude the regulated entities from reporting on inner-city outreach activities since the provisions requiring recruitment in urban communities apply only to the FHFA.

The FHLBank also requests that the FHFA remove the provision requiring the regulated entities to report on activities to provide financial literacy education. Such duties are only required for the FHFA as provided in 12 U.S.C. §4520(f), and the regulated entities should not be required to provide financial literacy education since Congress specifically limited the requirement to provide financial literacy education to the FHFA. Proposed §1207.10(c)(4) requires the FHFA to, where feasible, partner "with inner-city high schools, girl's [sic] schools, and high schools with majority minority populations to establish or enhance financial literacy programs and provide mentoring." Financial literacy education is substantially beyond the scope of 12 U.S.C. §4520 as it applies to the regulated entities and, accordingly, the regulated entities should not be required to engage in, nor report on, financial literacy education activities since the provisions on financial literacy education apply only to the FHFA.

Finally, the FHLBank requests that the FHFA remove, or in the alternative clarify, the requirement that the regulated entities report on efforts to provide technical assistance for participation in the contracting process. Although the FHFA set forth an affirmative duty requiring the FHFA to offer technical assistance in proposed §1207.11(b)(2), the regulated entities are appropriately excluded from such requirement since they are not US government agencies with a duty to provide technical assistance to the public. Since the regulated entities are not required to provide technical assistance, and since such assistance is outside the scope of 12 U.S.C. §4520, the regulated entities should not be required to report on technical assistance activities. Alternatively, if the FHFA determines that such reporting is necessary, the FHLBank respectfully requests the FHFA clarify which types of activities constitute technical assistance.

1207.23(b)(18) and (19) Annual Reports

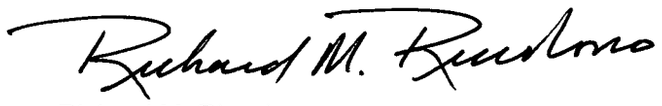
Proposed §1207.23(b)(18) and (19) require the regulated entities to provide narratives in the annual report identifying and analyzing successful and unsuccessful activities, describing the progress made from the previous year, discussing areas where improvement is necessary, and describing anticipated efforts and results expected in the succeeding year. Despite proposed §1207.3, the FHLBank is concerned that providing such a narrative may have unintended consequences that could lead to litigation despite a good faith effort by the regulated entity to comply with the regulation.

The FHLBank believes that the information requested by proposed §1207.23(b)(18) and (19) is beyond the scope of 12 U.S.C. §4520(d) and is not necessary to achieve its purposes. Information concerning the FHLBank's success or lack of success in achieving the purpose of regulations, and areas in which efforts need to improve, should be addressed in the confidential examination process rather than in a report that might be subject to public disclosure under the Freedom of Information Act. Such disclosures in a report could create an increased threat of litigation or, at a minimum, increased scrutiny that is unnecessary and potentially harmful to the reputation and safety and soundness of the regulated entities.

The FHLBank accordingly requests that the FHFA remove proposed §1207.23(b)(18) and (19). In the alternative, if the FHFA believes the information is necessary for a complete report, the FHLBank respectfully requests that the regulation specify that the information received pursuant to the reporting requirements in proposed §1207.23(b)(18) and (19) shall be considered "Unpublished Information" as defined in 12 C.F.R. §911.1 and protected as described in 12 C.F.R Part 911.

The FHLBank thanks the FHFA for its consideration of these comments.

Sincerely,



Richard M. Riccobono
President and Chief Executive Officer